

Nguyen (Migration) [2023] AATA 3861 (27 July 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mrs Thi Ngoc Nguyen
VISA APPLICANT:	Mr Trung Hieu Tran
REPRESENTATIVE:	Mrs Pauline Lam (MARN: 9476142)
CASE NUMBER:	1904889
DIBP REFERENCE(S):	BCC2018/3812778
MEMBER:	Kira Raif
DATE:	27 July 2023
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211 of Schedule 2 to the Regulations • cl.309.221 of Schedule 2 to the Regulations

Statement made on 27 July 2023 at 6:31am

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine spousal relationship – financial aspects – nature of the household – social aspects – nature of the commitment – decision under review remitted
1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cls 309.211, 309.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

Application for review

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 26 February 2019 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
3. The visa applicant is a national of Vietnam, born in January 1986. He applied for the visa on 11 June 2018 on the basis of his relationship with his sponsor. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 because the delegate was not satisfied the applicant was the spouse of the sponsor. The sponsor (the review applicant) seeks review of the delegate's decision.
4. The review applicant was represented in relation to the review. No hearing was held as the Tribunal was able to make a favourable decision on the material before it. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

Relevant law

5. At the time the application was made, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
6. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant
7. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3). Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP*[2017] FCAFC 206.

Are the parties validly married?

8. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The applicant provided with the application a copy of the marriage certificate showing that his marriage to the sponsor was registered in Vietnam in January 2018. There is nothing to suggest the marriage is not valid. The Tribunal is satisfied that the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

9. The primary decision record indicates that the delegate had considerable concerns about aspects of the relationship and the Tribunal shares these concerns. There was very limited

amount of documentary evidence submitted with the primary application and while there is some additional evidence before the Tribunal, in the Tribunal's view, it is not necessarily reflective of a relationship of the claimed duration.

10. The Tribunal also shares the delegate's concerns about the inception of the relationship, lack of evidence about the parties' contact, the delay in arranging the engagement after the parties agreed to a committed relationship and the limited time they had spent together. These concerns had not been addressed to the satisfaction of the Tribunal. Nevertheless, for the reasons set out below, the Tribunal has formed the view that the applicant is the spouse of the sponsor.
11. The Tribunal has considered the financial aspects of the relationship. The primary decision record refers to evidence of a money transfer relating to the applicant and the sponsor dated 2018. The review applicant provided to the Tribunal her bank statements from 2022 to 2023, showing among other things funds transfers from a person with the same name as the applicant. As the evidence indicates more frequent transfers after the primary decision was made (noting lack of evidence of financial support), the Tribunal is concerned about the motivations for these transfers. Nevertheless, the Tribunal accepts that the transfers did take place and that they evidence the couple's willingness to pool their resources. The review applicant also provided to the Tribunal her Tax return documentation from 2021 to 2022 in which the visa applicant is named as spouse.
12. There is no evidence of joint ownership of assets or joint liabilities. There is no evidence of any legal obligations owed by the parties. The Tribunal accepts there has been some pooling of financial resources. The Tribunal acknowledges that sharing of day to day expenses may be difficult when the parties reside in different countries.
13. The Tribunal has considered the nature of the household. The visa applicant submitted with the primary application statements from himself and the sponsor detailing periods of time spent cohabiting in Vietnam in 2017. The review applicant provided to the Tribunal temporary residence documentation dated to April 2019. The Tribunal accepts that the couple had lived together during that period. There is otherwise very little evidence before the Tribunal about the nature of their household during the periods of cohabitation and about the sharing of housework.
14. The review applicant provided to the Tribunal evidence that the couple have a child born in October 2020. The child's paternity has been confirmed through the DNA test. There is little evidence before the Tribunal about the joint responsibility for the care and support of their daughter, although the Tribunal acknowledges that the visa applicant's ability to engage in the care for the child may have been impeded by his inability to reside in Australia.
15. The Tribunal has considered the social aspects of the relationship. The visa applicant provided with the application a statement from the best friend of sponsor, dated to May 2018, attesting to genuineness of applicant and sponsor's relationship. The primary decision record indicates that the visa applicant also provided an assortment of social photographs. The review applicant provided to the Tribunal a number of photographs of the couple in each other's company and in presence of friends and family in different settings, dated to periods in 2020 and 2022. There are also before the Tribunal supporting statements from friends and family of applicant and sponsor dated to 2023 attesting to the genuineness of their relationship. The Tribunal is satisfied on the basis of that evidence that the applicant and sponsor represent themselves to other people as being married to each other. The Tribunal accepts that friends and acquaintances believe the relationship to be a genuine one. The Tribunal is satisfied that when living together, the applicant and sponsor plan and undertake joint social activities.

16. The relationship has been in existence for over five years. Both the visa applicant and the sponsor provided statements in which both detail their feelings towards each other as well as their ambitions for developing their family once applicant moves to Australia and there are additional statements from them before the Tribunal. The primary decision record also refers to evidence of telephone contact from periods in 2016 to 2018. The Tribunal has been provided with a number of social photographs of the couple and evidence of their communication. As noted above, they have a child together and in the Tribunal's view, that indicates that they view the relationship as a long term one. There is little evidence before the Tribunal to indicate that they draw companionship and emotional support from each other.
17. The Tribunal finds that there is only limited evidence of the relationship that has been presented with the primary application and to the Tribunal, particularly given the claimed duration of the relationship. Nevertheless, the Tribunal places significant weight to the fact that the couple now have a child and the Tribunal is satisfied that they are both committed to their daughter's upbringing. The Tribunal finds that this is representative of their mutual commitment to each other.
18. Having regard to all the evidence, and despite the significant concerns noted above and by the delegate in the primary decision, the Tribunal is satisfied, on balance, that the applicant and sponsor have a mutual commitment to shared life to the exclusion of others. the Tribunal finds that their relationship is genuine and continuing relationship. the Tribunal finds that they do not live separately and apart on a permanent basis. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision. Therefore the visa applicant meets cl.309.211 and cl.309.221.

Conclusion

19. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

20. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl.309.211 of Schedule 2 to the Regulations
 - cl.309.221 of Schedule 2 to the Regulations

Kira Raif
Senior Member